

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ZEM ZEM SHRINERS,
Plaintiff

v.

PATRICK H. SCHWINDT,
Defendant

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CIVIL ACTION NO. 05-57 ERIE

HEARING ON DEFENDANT'S MOTION TO QUASH AND/OR MODIFY SUBPOENAS

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Courtroom C, U.S. Courthouse, Erie,
Pennsylvania, on Monday, June 27, 2005.

APPEARANCES:

RICHARD A. LANZILLO, Esquire, appearing on
behalf of the Plaintiff.

PHILIP B. FRIEDMAN, Esquire, appearing on
behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the proceedings began at 9:00 a.m., on Monday, June 27, 2005, in Courtroom C.)

THE COURT: We have a motion to quash and/or modify subpoenas today.

MR. FRIEDMAN: That is correct, your Honor. The plaintiff has filed numerous subpoenas in this case requesting every conceivable financial document they could think of regarding Mr. Schwindt going all the way back to 1993. As the court will recall, they have made allegations of misappropriation, either by establishing procedures that were not fully effective or by outright embezzlement. They haven't specified what it was, how it was done or even what was taken, other than some guesstimates because of a decrease in the amount of income. It is our position that to go back and subpoena financial records of this voluminous nature covering every aspect of an individual's life, is not only not fair but it's not relevant to those proceedings.

THE COURT: Isn't his point, to steal a phrase "follow the money", isn't he trying to -- the theory is, the allegation is that the defendant over a period of several years embezzled money from the plaintiff and largely in cash. He wants to look, take a picture of his financial health before he

1 allegedly became involved in that activity, while he was
2 engaged allegedly in this activity, and then a short period of
3 time after he was allegedly no longer engaged in that activity
4 to see if there's a spike in his assets. That's what I
5 understand -- that's how it purports to be relevant.

6 MR. FRIEDMAN: That is sort of what his allegation
7 is. But what they are doing is requesting not only the
8 deposits and I don't know, they're requesting every document,
9 every financial record.

10 THE COURT: It appears they're requesting just about
11 everything.

12 MR. FRIEDMAN: Including mortgages, IRAs, checks
13 they've written, personal matters, political contributions,
14 charitable contributions.

15 THE COURT: I don't know if you would know this.
16 But throughout the relevant time period, when I say the
17 relevant time period, I'm talking about the time period that
18 forms the subject matter of the subpoena, '93 to '05, I think,
19 was he married throughout that period of time?

20 MR. FRIEDMAN: He was.

21 THE COURT: Do you know if his wife worked
22 throughout that period of time?

23 MR. FRIEDMAN: I don't know if she worked that
24 entire period of time, I know she has worked.

25 THE COURT: She would be filing, be on an income tax

1 return -- at least for some years she would have been reporting
2 her own income?

3 MR. FRIEDMAN: That's correct, your Honor.

4 THE COURT: All right. So, basically, as set forth
5 in the motion, as articulated by you, it's overly broad, it's
6 too long a time period, it's irrelevant and it sweeps up the
7 wife as well?

8 MR. FRIEDMAN: Exactly. You know, your Honor, as we
9 suggested during our first set of arguments, I don't believe
10 this court has jurisdiction in this matter. I requested that
11 discovery initially be limited to the jurisdictional issue, the
12 court denied that. But we're now into the huge, voluminous
13 task of uncovering every aspect of these persons' lives. If
14 this court indeed does not have jurisdiction, it would seem to
15 me it's extremely unfair to order this type of production.

16 THE COURT: Even if it should come to pass on a
17 further motion or whatever that I decide that I don't have
18 jurisdiction, some other court would.

19 MR. FRIEDMAN: Possibly that is something we would
20 have to deal with potentially.

21 THE COURT: They would have the same thing before
22 them.

23 MR. FRIEDMAN: They may or may not.

24 THE COURT: Obviously, one of the concerns here is
25 the sensitive nature, personal nature of the information.

1 Aren't there adequate means, and it happens all the time, by
2 way of protective orders and that type of thing, to ensure that
3 that information is not disseminated further, anything further
4 is absolutely necessary?

5 MR. FRIEDMAN: That's part of our position. We made
6 that request as well. They have also, according to the
7 information we have, they have contacted the Internal Revenue
8 Service and have gotten agents involved.

9 THE COURT: The Zem Zem people?

10 MR. FRIEDMAN: Yes. We believe in part that these
11 documents are being sought for purposes of handing them over to
12 the Internal Revenue Service. It does not seem to be an
13 appropriate use.

14 THE COURT: The Internal Revenue Service presumably
15 would already have a lot of documents, wouldn't they, tax
16 returns?

17 MR. FRIEDMAN: Tax returns. They don't have all of
18 these other documents. The only way they're going to obtain
19 them is if they go through a lengthy process. Any documents
20 disclosed in this case ought to be done pursuant to a
21 protective order.

22 THE COURT: All right. Let me hear what Mr.
23 Lanzillo has to say.

24 MR. FRIEDMAN: Thank you, your Honor.

25 MR. LANZILLO: Your Honor accurately characterized

1 our objective here as an attempt to follow the money. In terms
2 of our alleged effort to embark on a fishing expedition, judge,
3 I mean here's what we know so far. We know that immediately
4 after Mr. Schwindt was forced out as our bingo manager at Zem
5 Zem, that revenue spiked up about fourfold from the bingo
6 operation. We've been able to identify a number of suspicious
7 transfers of moneys to both Mr. Schwindt and to an associate of
8 Mr. Schwindt, a Dick Post, who was found dead under a train
9 trestle several months ago.

10 THE COURT: Who's Dick Post?

11 MR. LANZILLO: He was --

12 THE COURT: I should say who was Dick Post?

13 MR. LANZILLO: Mr. Post was one of two of the most
14 common signatures you'll find on checks coming out of the bingo
15 account at Zem Zem. He was associated with the bingo
16 operations with Mr. Schwindt. And he's no longer available,
17 obviously, because through some undetermined means he ended up
18 dead under a train trestle.

19 THE COURT: Where?

20 MR. LANZILLO: Out in Girard.

21 THE COURT: Was it ever ruled on -- did he jump, was
22 it suicide, was it foul play, what did they say?

23 MR. LANZILLO: The coroner delayed for a long period
24 of time in making a ruling, I think his ruling was accidental.
25 Although, the circumstances remain unclear. But getting back

1 to my point here, your Honor. While we've been able to
2 identify some suspicious transfers already, most of this money
3 was taken in cash. It was Mr. Schwindt who exercised almost
4 dictatorial control of, almost dictatorial control of the
5 operations of the bingo. In order to get all the details here,
6 we need to do a comparison of what Mr. Schwindt was deriving
7 from his -- relative to his employment as a part owner of a
8 landscape business. We're aware that his wife also had
9 employment and that her income, from what we can tell, was not
10 substantial.

11 THE COURT: Why do you care about her income?

12 MR. LANZILLO: It's joint.

13 THE COURT: It's a joint return. If you already
14 know, if you don't know the dollar value, you know whatever she
15 was making was relatively insignificant, is that right?

16 MR. LANZILLO: In fairness to Mrs. Schwindt --

17 THE COURT: Why couldn't you just black that out --
18 do you really care about her portion of the return?

19 MR. LANZILLO: This is a joint account. We can't
20 look at the whole picture without her. We certainly would
21 agree to a stipulated protective order. I've got them on my
22 system, we're not interested in providing information to anyone
23 else.

24 THE COURT: What about Mr. Friedman's point, I'm not
25 even sure what the implications of this are, you get the

1 returns, the records and you turn them over to the IRS -- is
2 there an active IRS investigation going on, do you know, Mr.
3 Friedman?

4 MR. FRIEDMAN: It's my understanding there is.

5 MR. LANZILLO: I don't know nothing about that.
6 I'll represent to the court I have had no contact with the IRS,
7 I cannot speak on behalf of others at Zem Zem. But that has
8 not been my focus. I would be happy to put into a stipulated
9 protective order that we would not produce documents to any
10 third party absent lawful subpoena to us, which, obviously, Mr.
11 Friedman could then challenge in that proceeding. That's not
12 what this is about. We just simply can't get a picture here of
13 the transactions without the information. I intentionally
14 chose a period of time, your Honor, that I thought was very
15 reasonable. It's really two years prior to when Mr. Schwindt
16 took over.

17 THE COURT: How was he employed before he became
18 employed as bingo manager?

19 MR. LANZILLO: My understanding is he has always
20 been with a business known as Schwindt Brothers, which is
21 operating now as a landscape service. We investigated that
22 matter, I see Mr. Schwindt apparently had some other business
23 interests in Arizona and other locations. We believe that
24 those entities, including Schwindt Brothers, were receiving
25 laundered or used the laundered money from Zem Zem. Which is

1 something we'll have to get into as well. But this is going to
2 be a question of following the money trail. It's not going to
3 be particularly easy. There was very tight control by Mr.
4 Schwindt over the bingo. It is remarkable to me that a number
5 of people who spent time with Mr. Schwindt at his property in
6 Arizona. There are very few people in the inner circle, I
7 don't know where this investigation is going to take us, but
8 very few people are in the inner circle, not very close to Mr.
9 Schwindt. And, apparently, were entertained by him in Arizona.
10 And it's not going to be a particularly easy task to pierce
11 through what is involved --

12 THE COURT: Who's in the inner circle?

13 MR. LANZILLO: Well, there are other members of the
14 club. I mean, the whole circumstance is odd. We've got an
15 accounting auditor --

16 THE COURT: Michael Moore?

17 MR. LANZILLO: Yes, he was the auditor for Zem Zem
18 at the time he was the accountant for Mr. Schwindt.

19 THE COURT: Are you suggesting that these people,
20 like the CPA, were conspiratorially involved?

21 MR. LANZILLO: At this point I'm not suggesting
22 anything. I do not know, this is going to require a great deal
23 of effort. It's going to require a forensic accountant. I
24 can't necessarily count on a lot of individuals to be anxious
25 to be forthcoming with information.

1 THE COURT: Of course, there's no reason you would
2 not be aware of -- you're not aware of what Mr. Friedman says
3 he's aware of, that is --

4 MR. LANZILLO: An IRS investigation?

5 THE COURT: IRS criminal investigation, is that your
6 understanding or you don't know?

7 MR. FRIEDMAN: We don't know for sure.

8 THE COURT: What's the source of that?

9 MR. FRIEDMAN: Zem Zem brought in Harry Anderson,
10 the court's very familiar with Mr. Anderson, our understanding
11 is Mr. Anderson had contact with people in the IRS office.

12 THE COURT: All right. With respect to Northwest
13 Savings Bank, Marquette Savings Bank, PNC, have their counsel
14 been in touch with you, did they express an opinion as to --
15 did you serve the subpoenas on them --

16 MR. LANZILLO: I served them. I've gotten no
17 reluctance or indication from the recipients of the subpoenas
18 that they have any qualms about producing the documents.
19 They're aware of the motion to quash. And in most cases
20 they're awaiting the court's ruling on those. In one instance,
21 I believe it was Marquette -- actually produced documents
22 before the motion to quash was filed. No one has expressed an
23 objection or a concern regarding the scope of the subpoenas.
24 No one has indicated they are unduly burdensome. Judge, I
25 should note one thing with respect to your last question. I

1 understand that Mr. Moore, the auditor, had compiled the
2 documents, was ready to produce them to us when Mr. Schwindt
3 intercepted the records. I'm not sure Mr. Moore actually
4 retained copies of what was intercepted.

5 THE COURT: What do you mean intercepted?

6 MR. LANZILLO: We actually got a call from Mr.
7 Moore's office that the documents were ready. We dispatched a
8 runner to go get them. When the runner arrived, the documents
9 had been picked up on behalf of Mr. Schwindt.

10 THE COURT: By who?

11 MR. LANZILLO: I assume Mr. Friedman's office, I
12 don't know. The indication given to my runner, those were the
13 documents. So they now apparently may be in the possession or
14 control of Mr. Schwindt or counsel.

15 THE COURT: Do you have them?

16 MR. FRIEDMAN: The only documents we have, your
17 Honor, is the tax returns from Mr. Moore. We just have copies
18 of tax returns, I don't know what you're referring to.

19 MR. LANZILLO: We received a call indicating that
20 Mr. Moore had the documents ready for production.

21 THE COURT: What documents did you request from Mr.
22 Moore?

23 MR. LANZILLO: They're in the subpoena, but it was
24 documents beyond --

25 THE COURT: I see it, all right.

1 MR. LANZILLO: Documents beyond tax returns, your
2 Honor.

3 THE COURT: Well, that's something that will just
4 have to get shaken out one way or the other. Let's now go to
5 the practical side of this. And you can sit down. Mr.
6 Friedman, in your papers alternatively you request at the end
7 there be some type of -- that if the information is ordered to
8 be disclosed, it be subject to a protective order, to prohibit
9 disclosure to any and all third parties. Is there anything
10 beyond that that you are looking for specifically or what?

11 MR. FRIEDMAN: In terms of a protective order?

12 THE COURT: Right.

13 MR. FRIEDMAN: The only matters are what we argued
14 already, statute of limitations, not going back to 1993, the
15 statute of limitations is five years on this case. Even to go
16 back to 1995 seems to me to be well beyond the statute.

17 THE COURT: He wouldn't be suing for conduct in '93
18 but using evidentiary support, I gather, for the conduct that
19 forms the subject matter. But you're quite right, that conduct
20 arguably would be time-barred. But let me get an order on the
21 record here and then we'll take it from there. This is an
22 order.

23 ORDER

24 Presently pending before the court is a motion to
25 quash and/or modify subpoenas. In the interest of brevity,

1 I simply incorporate by reference the individual subpoenas
2 attached to the defendant's motion.

3 As set forth in the plaintiff's response and as
4 developed more fully at oral argument, plaintiff seeks various
5 financially-related documents relative to the defendant and his
6 wife from various individuals and/or entities, including
7 Michael T. Moore, CPA; Northwest Savings Bank; Marquette
8 Savings Bank; PNC Bank; and Schwindt Brothers. Plaintiff
9 contends that this information is relevant in its effort to
10 attempt to trace money or moneys which the defendant allegedly
11 embezzled from the plaintiff over a significant period of time.
12 Specifically, plaintiff contends that the scope of the
13 subpoenas, 1993 through 2005, is reasonable in that it is
14 necessary to take a snapshot of the defendant's economic
15 picture prior to his involvement with Zem Zem, during his
16 involvement with Zem Zem, and subsequent to his involvement
17 with Zem Zem, in a further effort to trace the allegedly
18 ill-gotten proceeds.

19 After careful consideration, the court is of the
20 opinion that pursuant to Federal Rule of Civil Procedure
21 26(b)(1), that the type of information sought here is relevant
22 to the claim of the plaintiff and, in my view, is subject to no
23 applicable privilege. That said, in ordering the production,
24 let me also say this. With respect to the time period, not
25 only as to the substance of the subpoenas, but with respect to

1 the time period of the subpoenas, I'm of the opinion that they
2 are not overly broad and that the financial picture of the
3 defendant immediately before and immediately subsequent to his
4 employment with the plaintiff is relevant and potentially
5 calculated to lead to the discovery of other admissible
6 evidence.

7 That said, given the fact that a number of documents
8 that are requested would involve joint accounts with his wife
9 and joint tax returns and beyond that, given the sensitive
10 nature of the information in general, the court in denying the
11 motion to quash directs the plaintiff that the information that
12 is produced is to be maintained only by plaintiff's counsel and
13 is to be shared with no third party. Now, when I say
14 plaintiff's counsel, it also, of course, includes associates
15 that would be working on it and that type of thing.

16 MR. LANZILLO: Your Honor, I trust that would also
17 include any experts?

18 THE COURT: Forensic auditors?

19 MR. LANZILLO: Right.

20 THE COURT: Yes, but that's it. But I also want you
21 to prepare -- well, strike that.

22 MR. LANZILLO: Your Honor, if I may, I may be able
23 to help. I have a standard stipulated protective order, the
24 basic elements of which --

25 THE COURT: I think you should submit that for my

1 signature. Anyone, like your expert, who would be getting a
2 copy of this, I want him or her to get a copy of this
3 protective order so they understand perfectly well that any
4 limitations that are imposed on you, are equally imposed on
5 them.

6 MR. LANZILLO: In fact, your Honor, as I recall the
7 order, it has an acknowledgment that it's required that it be
8 signed by any third-party expert who might be receiving
9 confidential documents or information acknowledging in writing
10 that they are aware of the restrictions placed on them by the
11 order.

12 THE COURT: All right, let's go off the record here
13 for a second.

14 (Discussion held off the record.)

15
16 (Whereupon, at 9:26 a.m., the proceedings were
17 concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in dark ink, appearing to read 'Ronald J. Bench', is written over a horizontal line.

Ronald J. Bench